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IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 1ST DAY OF APRIL 1998

BEFORE

THE HON'BLE MR.JUSTICE H.N.NARAYAN

C.R.P.NO.214/1998

Khasib Sab
s/o. Saidam Sab, major
r/o. Donabagatta village
Kasaba Hobli, Bhadravathi Tq. .. Petitioner

(By Sri.R.Gopal-Adv.)

- vs -

Jabbar Sab
s/o. Khasim Sab, ~~ma~~ major
Agriculturist
r/o. Donabagatta village
Bhadravathi Taluk .. Respondent

Civil revision petition filed under
Section 115 of CPC against the order dated
12-12-1997 passed in O.S.No.910/93 on the
file of the I Addl. Civil Judge, and JMFC
Bhadravathi, allowing I.A.IX filed under
Order 26 Rule 9 of CPC.

This civil revision petition coming on
for admission today, the court made the
following :

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O R D E R

This matter coming on for admission is taken up for final disposal by consent of the learned counsel appearing for the parties and disposed of by this order.

2. In a suit for bare injunction the trial Court has allowed an application of the defendant for appointment of a commissioner to measure the land. There is some background in this suit. The defendant has filed a suit for specific performance of the agreement allegedly executed by the plaintiff in his favour.agreeing to sell the suit schedule property. There is a disputed possession. Therefore, the plaintiff asserting his possession has filed a suit against the defendant alleging interference with his possession.

3. The defendant claims delivery of possession under Section 53A of the Transfer of Property Act. The Court has to decide whether the plaintiff is in possession as on the date of the suit. That is the only question

to be determined in the suit. When the suit has reached the final stage, the defendant has now filed this application seeking appointment of a Court Commissioner to measure the suit property. It does not arise at all. The trial Court says that the identity of the property by a Commissioner does not amount to fishing in evidence. The learned Munsiff has not properly appreciated the judgment of this Court reported in AIR 1996 Kar.257 (PUTTAPPA - vs - RAMAPPA) even though he has extracted the law laid down by this Court regarding the amendment of the Commissioner. The learned Munsiff is too smart to distinguish the law laid by this Court in order to allow the defendant's application. Normally, this Court would not disturb a discretionary order like this but, where exercise of jurisdiction is erroneous, necessarily the order has to be set aside in exercise of the jurisdiction under Section 115 of CPC. It is a clear case of erroneous exercise of jurisdiction.

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In the result, the revision is allowed.

The impugned order is set aside.

Sd/-
JUDGE

rs/-